

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

May 13, 2020

SEAN F. MCAVOY, CLERK

STATE OF WASHINGTON;
COMMONWEALTH OF VIRGINIA;
STATE OF COLORADO; STATE
OF DELAWARE; STATE OF
ILLINOIS; COMMONWEALTH OF
MASSACHUSETTS; DANA
NESSEL, Attorney General on behalf
of the people of Michigan; STATE OF
MINNESOTA; STATE OF
NEVADA; STATE OF NEW
JERSEY; STATE OF NEW
MEXICO; STATE OF RHODE
ISLAND; STATE OF MARYLAND;
STATE OF HAWAI'I,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY, a
federal agency; KEVIN K.
MCALEENAN, in his official
capacity as Acting Secretary of the
United States Department of
Homeland Security; UNITED
STATES CITIZENSHIP AND
IMMIGRATION SERVICES, a
federal agency; KENNETH T.
CUCCINELLI, II, in his official
capacity as Acting Director of United
States Citizenship and Immigration
Services,

Defendants.

NO: 4:19-CV-5210-RMP

ORDER DENYING IN PART AND
GRANTING IN PART
DEFENDANTS' MOTION TO STAY
DISCOVERY ORDER RE:
PRIVILEGE LOG

1 BEFORE THE COURT is the Defendants¹ (“DHS”) Motion for Stay of
2 Order or, in the Alternative, for Extension of Time to Produce Privilege Log, ECF
3 No. 213. The Court previously found good cause to expedite hearing of the portion
4 of DHS’s motion relating to staying production of a privilege log. ECF No. 215.
5 Having considered Defendants’ motion, Plaintiffs’² (the “States”) opposition, and
6 Defendants’ reply, the remaining docket, and the relevant law, the Court is fully
7 informed.

8 In resolving a Motion to Compel filed by the States, the Court found that the
9 States had rebutted the presumption that the administrative record is complete,
10 because there is clear evidence that certain communications that the agency relied
11 upon in the rulemaking process were omitted from the record. ECF No. 210 at 11;
12 *see also* ECF No. 195 at 7–8. Consequently, the Court ruled that production of a
13 privilege log by DHS is appropriate and necessary to facilitate further inquiry into
14 the nature and appropriateness of the alleged privilege, or privileges, that DHS seeks
15

16 ¹ Defendants in this lawsuit are the United States Department of Homeland
17 Security (“DHS”), Acting Secretary of DHS Kevin K. McAleenan, United States
18 Citizenship and Immigration Services (“USCIS”), and Acting Director of USCIS
Kenneth T. Cuccinelli II (collectively, “DHS”).

19 ² The Plaintiffs in this lawsuit are the State of Washington, Commonwealth of
20 Virginia, State of Colorado, State of Delaware, State of Hawai’i, State of Illinois,
21 State of Maryland, Commonwealth of Massachusetts, Attorney General Dana
Nessel on behalf of the People of Michigan, State of Minnesota, State of Nevada,
State of New Jersey, State of New Mexico, and State of Rhode Island (collectively,
the “States”).

1 to invoke to support exclusion of the communications from the administrative
2 record. *Id.* at 12.

3 DHS seeks to stay the requirement of providing a privilege log until a not-yet-
4 filed motion to dismiss has been decided. ECF No. 213 at 6. Alternatively, DHS
5 seeks to extend the time to provide a privilege log. *Id.* at 8. The States oppose a
6 stay of the privilege log deadline pending resolution of a forthcoming motion to
7 dismiss, but consent to a limited extension of the privilege log deadline. ECF No.
8 216.

9 The four factors to consider regarding a stay of a prior order include: “(1)
10 whether the stay applicant has made a strong showing that he is likely to succeed on
11 the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)
12 whether issuance of the stay will substantially injure the other parties interested in
13 the proceeding; and (4) where the public interest lies.” *Lair v. Bullock*, 697 F.3d
14 1200, 1203 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)).

15 ““A stay is not a matter of right, even if irreparable injury might otherwise
16 result.”” *Nken*, 556 U.S. at 433 (quoting *Virginian R. Co. v. United States*, 272 U.S.
17 658, 672 (1926)). Rather, a stay is ““an exercise of judicial discretion,”” and ““the
18 propriety of its issue is dependent upon the circumstances of the particular case.””
19 *Id.* (quoting *Virginian R. Co.*, 272 U.S. at 272–73) (alterations omitted).

20 DHS makes no showing in its Motion to Stay of a likelihood of success on the
21 merits. Rather, DHS relies on the reasoning of the Ninth Circuit Court of Appeals

1 motions panel in deciding whether to stay the preliminary injunction in this matter to
2 argue that DHS will succeed with its yet unfiled motion to dismiss. *See* ECF Nos.
3 213 at 6; 218 at 3 (citing *City & County of San Francisco v. USCIS*, 944 F.3d 773,
4 805 (9th Cir. 2019)). The merits of the claims raised by the States' Amended
5 Complaint are an open question. The Ninth Circuit's opinion does not purport to
6 determine the merits, nor was the motion panel's decision based on a complete
7 administrative record, which was not yet produced. *See City & County of San*
8 *Francisco*, 944 F.3d 773; ECF No. 216 at 4. To the extent that DHS is predicting
9 that a forthcoming motion to dismiss will be resolved in their favor, they have not
10 made an adequate showing to support staying the privilege log requirement on that
11 basis.

12 Next, with respect to whether DHS will be irreparably harmed by the
13 requirement of producing a privilege log, the Court rejects DHS's argument that a
14 privilege log has no relevance at the pleading stage. *See* ECF No. 213 at 6. DHS
15 did not object to producing the administrative record in this matter in November
16 2019. *See* ECF No. 193 at 2. As early as that production, DHS should have been
17 aware of what was included and excluded from the record and why. By contrast, the
18 States persuasively argue that they will be harmed the longer DHS is excused from
19 compiling a privilege log in the form of "routine deletion, inadvertent loss, and
20 destruction of relevant e-mails, text messages, and other documents." ECF No. 216
21 at 2.

1 The public interest factor also disfavors a stay here, as a privilege log
2 facilitates a determination of whether the agency is invoking a privilege to protect a
3 public interest in confidentiality or to the detriment of a competing public interest in
4 disclosure. *See PG&E v. United States*, 70 Fed. Cl. 128, 142 (2006) (requiring
5 defendant agencies to provide specific reasons for protecting documents helps to
6 ensure that “the government official called upon to examine documents ‘has
7 inspected the individual documents and determined that the public interest in
8 confidentiality (as distinct from the government’s interest in the litigation)
9 outweighs the public interest in disclosure.’”) (quoting *Resolution Trust Corp. v.*
10 *Diamond*, 773 F. Supp. 597, 603 (S.D.N.Y. 1991)).

11 Therefore, based on all of the relevant factors and in light of the likelihood of
12 serious harm to the States’ interest and the public in learning what materials DHS
13 withheld from the administrative record, the Court finds the States’ consent to an
14 extended deadline for DHS to produce the privilege log on a rolling basis to be
15 reasonable.

16 Accordingly, **IT IS HEREBY ORDERED:**

17 1. DHS’s Motion to Stay Motion for Stay of Order or, in the Alternative,
18 for Extension of Time to Produce Privilege Log, **ECF No. 213**, is **DENIED IN**
19 **PART** with respect to staying production of the privilege log pending a forthcoming
20 motion to dismiss, and **GRANTED IN PART** with respect to extending the
21 deadline for DHS to produce a privilege log as follows:

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS’
MOTION TO STAY DISCOVERY ORDER RE: PRIVILEGE LOG ~ 5

1 a. DHS shall produce a privilege log on a rolling basis starting on June 12,
2 2020.

3 b. Beginning on June 12, 2020, DHS shall make reports to the Court and
4 the States every other Friday, on their progress toward completion of
5 the privilege log. This report should include DHS's progress on:

- 6 i. notifying potential custodians of their obligation to preserve
7 potentially relevant documents, even if assertedly privileged;
8 ii. segregating all assertedly privileged documents for review; and
9 iii. logging privileged documents pursuant to Fed. R. Civ. P.

10 26(b)(5)(A). The numbers of custodians notified and documents
11 segregated and logged that are reported in DHS's report should
12 be stated in absolute terms and as a percentage of the whole, so
13 the States and the Court can assess DHS's progress toward
14 completion.

15 2. The Motion for Stay of Order, **ECF No. 213**, shall **remaining pending**
16 for further briefing on the issue of whether to stay discovery on the States' equal
17 protection claim. *See* ECF No. 215.

18 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
19 Order and provide copies to counsel.

20 **DATED** May 13, 2020.

21 s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Judge